Supreme Court, U.S.
F I D

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In the Supreme Court of the United States

OCTOBER TERM, 1998

MARY CAROLE HALICKI
Petitioner

VERSUS

LOUISIANA CASINO CRUISES, INCORPORATED;
ARTHUR FRANK LOUISIANA
CASINO CRUISES, INCORPORATED,
doing business as Casino Rouge Carnival Corporation
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTIONS PRESENTED

In this case, summary judgment was rendered in favor of respondent, a defendant in a gender discrimination suit under Title VII. Relying on Federal Rule of Civil Procedure 6(e), counsel for petitioner filed a motion under Federal Rule of Civil Procedure 59(e) twelve days after entry of judgment. Ten days after the original appeal delays had run, respondent filed its opposition to the Rule 59(e) motion, arguing that it was untimely. Four days after receiving respondent's opposition and realizing that the Rule 59(e) motion may not have suspended the appeal delays, counsel for petitioner filed a motion to extend the appeal delays under Federal Rule of Appellate Procedure 4.

The questions presented are:

(1) Whether misapplication of a mail rule to a Rule 59(e) motion can never, as a matter of law, constitute excusable neglect.

(2) Whether the undisputed good faith misapplication of a procedural rule, where no prejudice results to the non-movant or to the administration of justice, weighs heavily towards a finding of excusable neglect and an extension of the appeal delays.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

MARY CAROLE HALICKI
Plaintiff-Petitioner

V.

LOUISIANA CASINO CRUISES, INCORPORATED;
ARTHUR FRANK LOUISIANA
CASINO CRUISES, INCORPORATED,
doing business as Casino Rouge Carnival Corporation
Defendant-Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Mary Carole Halicki respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998). The Fifth Circuit's opinion is reprinted in the attached Appendix ("App.") at A-3.

JURISDICTION

The Judgment of the Fifth Circuit was entered on

September 1, 1998. (App., A-3). The Fifth Circuit denied a timely petition for rehearing on October 2, 1998, (App., A-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 6. (App., A-31).

Federal Rule of Appellate Procedure 4. (App., A-33).

STATEMENT OF CASE

I. Underlying Gender Discrimination Claims under Title VII.

On November 28, 1995, Mary Carole Halicki, Petitioner ("Ms. Halicki"), the former marketing manager of Casino Rouge and its highest ranking female manager under her dismissal, filed suit against her former employer, Louisiana Casino Cruises, Inc. d/b/a Casino Rouge, Respondent ("Casino Rouge"), alleging that Casino Rouge discriminated against her in the terms and conditions of employment and ultimately terminated her because of her sex in violation of Title VII. (Trial Record[1], Vol. 1, pp. 1345-1347). The United States District Court, Middle District of Louisiana, had federal question jurisdiction pursuant to 42 U.S.C. §2000(e)-5(f) and 28 U.S.C. §1343(a)(4).

On October 15, 1996, Casino Rouge filed a Motion for Summary Judgment, claiming that the decision to terminate

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[1] Hereinafter, "TR".

Ms. Halicki was not based on gender in violation of Title VII, but was based on Casino Rouge's reorganization of the marketing department at Casino Rouge. (TR, Vol. 4, pp. 532-533). In opposition to the motion for summary judgment, Ms. Halicki submitted affidavits of numerous employees of Casino Rouge who testified that Ms. Halicki's direct supervisor, vice-president and director of marketing, J. Carroll Cotton and Casino Rouge's general manager, Art Frank, who terminated Ms. Halicki's employment, displayed sexist attitudes and gender based animus toward Ms. Halicki and other Casino Rouge women employees. (TR, Vol 4, pp. 432-450). Ms. Halicki also submitted evidence of disparate treatment by her employer. She submitted evidence that: (1) she was terminated because he was counseling a male employee concerning the fact that the general manager was having an affair with that employee's wife, where other male employees, who also counseled the employee were not terminated. (TR, Vol. 4, pp. 413-416); and (2) unlike another male employee's termination, Halicki was escorted off the property and was required to sign a waiver of any rights for any redress from Casino Rouge. (TR, Vol. 4, pp.416-417).

In deciding the motion for summary judgment, the district court indicated that the case hinged on "whether it is more likely than not that the defendants' actions were based on illegal discriminatory criteria." (District Court's Ruling, App., A-25). The district court rejected the evidence of disparate treatment and granted the motion for summary judgment, reasoning:

> "Even assuming that the real reason Art Frank terminated plaintiff was because plaintiff counseled Jim Vambaketes, this alone would not infer gender

based discrimination, even if other male employees weren't fired for counseling Jim Vambaketes. An employer may discharge an empoloyee for a good reason, mistaken reason, or no reason at all and will not violate Chapter VII as long as the decision is not based on gender." (District Court's Ruling, App., A-27).(footnote omitted).

II. Ms. Halicki's Motions under Federal Rules of Civil Procedure 59 and 60 under Federal Rule of Appellate Procedure 4

Twelve days[2] after the entry of the summary judgment, Halicki filed a Motion to Alter or Amend Judgment of Dismissal on Motion for Summary Judgment under Federal Rule of Civil Procedure ("Rule") 59(e) ("Rule 59(e) Motion"). (TR, Vol. 6, pp. 102-104). Although Rule 59 requires the motion to be filed within 10 days after entry of the judgment, counsel for Halicki relied on Rule 6(e) to provide an additional 3 days for filing her Rule 59(e) Motion. Rule 6(e) allows an additional 3 days when a party is required to do some act "after service of a notice or other paper and the notice or other paper is served by mail." Based on that reliance, counsel for Halicki believed that her delays for filing her notice of appeal were suspended by a timely Rule 59(e) Motion under Federal Rule of Appellate Procedure ("FRAP")4(a).

Counsel for Halicki did not realize that her Rule 59(e) Motion could be argued to be untimely until April 14, 1997, when Casino Rouge filed its "Memorandum in Opposition to Plaintiff's Rule 59 Motion to Alter or Amend Judgment

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[2] Twelve days calculated under Rule 6(a).

of Dismissal on Motion for Summary Judgment" ("Opposition"). (TR, Vol. 7, pp.26-29). The Opposition argued that Halicki's Rule 59(e) motion was untimely, because Rule 6(e) did not apply to the Rule 59(e) Motion.

Four days later, after realizing that her Rule 59(e) Motion could be considered as filed untimely and that her appeal delays may not have been suspended,[3] counsel for Halicki filed two motions. First, she filed a Motion for Leave to File Supplemental Memorandum in Support of Plaintiff's Motion to Alter or Amend Judgment of Dismissal on Motion for Summary Judgment ("Supplemental Memorandum"). (TR, Vol. 7, pp. 3A-16A). The Supplemental Memorandum requested additional relief under Rule 60(b) and also alternatively, for additional time to file a notice of appeal under FRAP 4(a)(5). On the same day the trial court granted Halicki's motion for leave to file her Supplemental Memorandum and issued notices. (Record Excerpts Submitted by Ms. Halicki in her Fifth Circuit Brief, Docket Entries, Tab 1, p. 17). Second, Halicki filed what was entitled an Ex Parte Motion to Extend the Time for Filing Notice of Appeal under FRAP 4(a)(5). (TR, Vol 7, pp. 13-25).

III. The Disposition of the Motion to Extend the Time for Filing Notice of Appeal by the Trial Court and United States Fifth Circuit Court of Appeals.

On May 2, 1997 the trial court entered a ruling and order denying all of Halicki's requested relief. (App. A-16 - A-19). Without evaluating the equitable factors of excusable

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[3] The original appeal delays expired on April 4, 1997.

neglect established by this Court,[4] the trial court found that: (1) the Rule 59(e) Motion was untimely; and (2) the FRAP 4(a)(5) Motion failed to demonstrate excusable neglect. The Fifth Circuit affirmed, holding that misapplication of the mail Rule 6(e) to a Rule 59(e) motion is not excusable neglect. *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, at 470 (5th Cir. 1998), App. A-10 - A-11. In its reasoning the Fifth Circuit rejected the fact that Casino Rouge would not have been prejudiced by an extension of the appeal delays. *Halicki*, 151 F.3d at 469 n.4, App. A-10, n.4. The Fifth Circuit found that the nature of the mistake, misconstruction of Rule 6(e), weighed heavily against a finding of excusable neglect. *Halicki*, 151 F.3d at 470, App. A-10.

REASONS FOR GRANTING THE PETITION

FRAP 4(a)(5) provides the district court discretion to extend the time for appeal upon a showing of "excusable neglect." This Court has held that the excusable neglect standard "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 at 395, 113 S.Ct. 1489, at 1498 (1993). Although *Pioneer* dealt with the excusable neglect standard under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, the United States Courts of Appeals have uniformly held that *Pioneer* applies to FRAP 4. *Stutson v. U.S.*, 516 U.S. 193, at 195, 116 S.Ct. 600, at 602 (1996).[5]

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[4] *Pioneer Inv. Services Co. v. Brunswick Associates, Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993).

[5] *Stutson* cites, *U.S. v. Clark*, 51 F.3d 42 (5th Cir. 1995)(Rule 4(b)); *U.S. v. Hooper*, 9 F.3d 257 (2 Cir. 1993)(same); *City of Chanute, Kan. v. Williams Natural Gas Co.*, 31 F.3d 1041 (10th Cir. 1994)(Rule 4(a)(5)), *cert. denied*, 513 U.S. 1191, 115 S.Ct. 1254 (1995); *Fink v. Union Central Life Ins. Co.*, 65 F.3d 722 (8th Cir. 1995), *Reynolds v. Wagner*, 55 F.3d 1426 (9th Cir.) (same) *cert. denied*, 516 U.S. 932, 116 S.Ct. 339 (1995), and *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, n.3 (1st Cir. 1995)(same).

The fundamental issue presented here is whether the Fifth Circuit's finding that misapplication of Rule 6(e), the mail rule, to a Rule 59(e) motion is not excusable neglect conflicts with *Pioneer* and other decisions of the United States Courts of Appeals. The Fifth Circuit finds that since Rule 6(e) "is unambiguous a district court's determination that the neglect was inexcusable is virtually unassailable." *Halicki*, 151 F.3d at 470, App. A-11. The Fifth Circuit reasons that even where no prejudice results from extending the appeal delays, such a mistake cannot be excusable neglect, because "almost every appellants lawyer would plead his own inability to understand the law when he fails to comply with a deadine." *Halicki*, 151 F.3d at 469-470, App., A-10-11, citing, *Advanced Estimating Systems, Inc. v. Riney*, 130 F.3d 1996 (11th Cir. 1997).

This result is confirmed by a recent decision of the Fifth Circuit in *Midwest Employer's Cas. Co. v. Williams*, ____F.3d____, 1998 WL 820237, (5th Cir. 11/24/98). *Williams* reversed the district court's finding of excusable neglect based on the attorney's misapplication of Rule 6(e) to Rule 59(e) motion. *Williams* rejected the district court's finding that the non-movant would not suffer undue prejudice and that the three day extension was a trap for the unwary, holding that "the nature of this very mistake weighs heavily against a finding of excusable neglect," *Williams*, at 2, citing, *Halicki*, 151 F.3d at 470.

Both *Halicki* and *Williams* reveal that the Fifth Circuit now holds that misconstruction of unambiguous rules can never, as a matter of law, constitute excusable neglect. These Fifth Circuit decisions are similar to an apparent trend with the Courts of Appeals to discount the liberalization of

the excusable neglect standard under *Pioneer*. See, *Advanced Estimating System, Inc. v. Riney*, 130 F.3d 996 at 998 (11th Cir. 1997)("attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of the consequence of failing to comply with a statutory deadline."); *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, at 825 (9th Cir. 1996)(counsel's misinterpretation and ignorance of procedural rules removed the need "for the court to consider expressly the equitable factors listed in *Pioneer*"); *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132, at 133 (7th Cir. 1996)("excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules") and *Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir. 1994)(misapplication of Rule 6(e) did not amount to excusable neglect).

The Fifth Circuit's bright line result is untenable for two reasons. First, it conflicts with *Pioneer* and other decisions of the Courts of Appeals that apply all of the equitable factors in determining whether excusable neglect exists. Second, all of the equitable factors under *Pioneer* weigh heavily towards a finding of excusable neglect in this case.

I. The Fifth Circuit Holds that Misconstruction of Procedural Rules Cannot be Excusable Neglect. This Absolute Rule is Inconsistent with Pioneer and other Decisions of the Courts of Appeals.

The Fifth Circuit's rulings in *Halicki* and *Williams* result in a finding that misinterpretation of an unambiguous procedural rule can never be excusable neglect. *Williams*, at 9, Dissenting Opinion of Circuit Judge Emilio M. Garza. The

Fifth Circuit improperly focuses solely on attorney error to preclude a consideration of all the equitable factors under *Pioneer*. *Halicki*, 151 F.3d at 470 ("nature of...mistake weighs heavily against a finding of excusable neglect."). See also, *Yost*, 92 F.3d at 825 (where the court found that misconstruction of an unambiguous rule removed the "need for the court to consider expressly the equitable factors listed in Pioneer."). In fact, the *Pioneer* majority expressly rejected a formulation that required a threshold determination that the movant is "sufficiently blameless" to allow the consideration of the other equitable factors. *Pioneer*, 507 U.S. at 395, n.14, 113 S.Ct. at 1497, n.14 *Pioneer* states:

> The only reliable means of eliminating the 'indeterminacy' the dissent finds so troubling would be to adopt a bright-line rule of the sort embraced by some Courts of Appeals, erecting a rigid barrier against late filings attributable in any degree to the movant's negligence. As we have suggested, however, such a construction is irreconcilable with our cases assigning a more flexible meaning to "excusable neglect". *Pioneer*, 507 U.S. at 395, n.14, 113 S.Ct. at 1497, n.14.

The Fifth Circuit's inflexible understanding of *Pioneer* "is untenable, for it contravenes the contextual nature of the excusable neglect determination." *Williams*, at 9, Dissent. Not only is the Fifth Circuit's rule inconsistent with *Pioneer*, it is also contrary to other decisions of the Courts of Appeals that have allowed misintrepretation of procedural rules to constitute excusable neglect under the *Pioneer* standard. *U.S. v. Brown*, 133 F.3d 993 (7th Cir. 1998); *City of Chanute, Kan. v. Williams Natural Gas Co.*, 31 F.3d 1041 (10th Cir. 1994);

U.S. v. Evbuomwan, No. 93-1738 (5th Cir. Sept. 9, 1994), recorded at 36 F.3d 89 (5th Cir. 1994 Table, No. 93-01738) a non-published opinion, attached as Appendix "G", App. A-39[6].

In *Brown*, the attorney confused Wisconsin state rules of procedure with the federal rules, believing that weekends and holidays tolled the ten day period for a criminal appeal, because the ten day period for filing a notice of appeal was less than eleven days. As a result, Brown filed the notice of appeal one day late. The district court found excusable neglect and the Seventh Circuit affirmed. Unlike the Fifth Circuit in *Halicki*, *Brown* recognizes that attorney error is not the only factor in determining excusable neglect:

> If the reason for the delay [attorney error] were the only factor to consider, or even the most important one, we might agree that the neglect in this case could not be excused. ... But *Pioneer* makes clear that the standard is a balancing test, meaning that a delay might be excused even where the reasons for the delay are not particularly compelling. We cannot say that the one day delay has prejudiced this court (though the discussion here demonstrates that it has required the court and the parties to devote resources to the issue in general), and while Brown's attorney in this case may have fallen a bit short of good lawyering, no one has suggested that he lacked good faith. *Brown*, 133 F.3d at 997 (*citations omitted*). (*brackets added*).

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[6] *Evbuomwan* is cited because it is binding precedent in the Fifth Circuit and it is cited by other Fifth Circuit excusable neglect cases. See *Williams*, at 3 and at 6, Dissent; *U.S. v. Clark*, 51 F.3d 42, at 44 (5th Cir. 1995).

In *Chanute* the attorney failed to follow clear U.S. Supreme Court jurisprudence and FRAP 3, which requires that all parties to an appeal be named in the notice of appeal. See, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405 (1988) (holding that FRAP 3(c)'s requirement that all parties taking the appeal be named in the notice of appeal is indispensable to appellate jurisdiction). In *Chanute,* the district court granted the appellant's motion to extend the time period to file the notice of appeal to allow the appellant to name all of the parties taking the appeal. *Chanute* affirmed the finding of excusable neglect, applying all of the equitable factors in *Pioneer.*

Unlike *Halicki, Chanute's* decision did not rise or fall on the attorney's "simple mistake or failure to discover the well established Supreme Court precedent in *Torres*". See, *Chanute,* 31 F.3d at 1046. Rather, *Chanute* weighs the attorney's simple mistake in view of all the *Pioneer* factors:

> It is true that fault in the delay remains a very important factor—perhaps the most important single factor—in determining whether neglect is excusable...However, under the entire circumstances of the case in looking to the other three *Pioneer* factors, the district court acted within this discretion. We see no danger of prejudice to Williams from the delay. The amended notice of appeal was filed only thirty-one days after the end of the prescribed period for notice of appeal in Fed.R.App. P. 4(a)(1), a very short time in the context of a protracted litigation battle during which the parties have been well aware of each others' identities. In addition, there is no evidence that the cities acted in other than food faith. We therefore affirm the district

> court's grant of the cities' Rule 4(a)(5) motion for extension of time to file notice of appeal." *Chanute*, 31 F.3d at 1046-1047.

Finally, *Halicki's* absolute rule is contrary to the Fifth Circuit's own precedent, established in *Evbuomwan*, App. A-39. *Evbuomwan* affirmed the district court's finding of excusable neglect based on an attorney's failure to file a timely notice of appeal due to a good faith misapplication of a mail rule. In *Evbuomwan* the attorney erroneously applied the mail rule under FRAP 26(c) to the time period for notice of appeal under FRAP 4(b). Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after service of a paper upon them, three calendar days are added to the prescribed period". Rule 4(b) provides in pertinent part that, "[i]n a criminal case, a defendant shall file a notice of appeal in a district court within ten days after the entry either of the judgment order appealed from, or of a notice of appeal by the government". As in this case, *Evbuomwan* found that the mail rule clearly did not apply, because the delay for a notice of appeal was triggered by "entry of judgment", rather than service by mail. *Evbuomwan*, App. A-42.

Despite the fact that *Evbuomwan* concluded that the three day mail rule clearly did not apply to Rule 4(b), the Fifth Circuit affirmed the district court's finding of excusable neglect. *Evbuomwan*, App. A-42 - A-43. In affirming the district court's decision, *Evbuomwan* correctly followed *Pioneer* stating:

> In determining whether counsel's neglect in filing a notice of appeal was "excusable" the court noted

> that "determination is at bottom an equitable one, taking account of all relevant circumstances, including the danger of prejudice, length of delay, potential impact on judicial proceedings, reason for delay, and whether the movant acted in good faith. *Id.* at 1498 (citation omitted). There is no indication that the government was at all prejudiced by the delay or that it affected judicial proceedings. On the facts of this case, the district court did not abuse its discretion by accepting a notice of appeal filed in good faith, two days late. *Evbuomwan,* App. A-43.

Evbuomwan's application of the multiple factors under *Pioneer* cannot be reconciled with the absolute rule that the Fifth Circuit now adopts in *Halicki.* Despite the unambiguous rules that were involved in *Evbuomwan,* the Fifth Circuit in that decision applied the equitable factors and affirmed the district court's conclusion that excusable neglect could be a good faith misapplication of a mail rule where there was no prejudice to the non-moving party or adverse impact on the judicial proceedings. *Halicki* should have followed *Evbuomwan's* flexible standard. Instead, the Fifth Circuit has wrongly returned to its prior strict approach that is inconsistent with *Pioneer.*

Pioneer did not intend to develop an absolute rule, precluding a finding of excusable neglect, where the attorney misinterprets a procedural rule. *Pioneer* states that the term neglect contemplates omissions caused by the carelessness or negligence of attorneys. Whether the neglect is excusable, depends upon an evaluation of all of the equitable factors under *Pioneer.* The Fifth Circuit's absolute test in this case

cannot be reconciled with *Pioneer's* rejection of a "rigid barrier against late filings" and other appellate court decisions that have found excusable neglect where the attorney failed to apply clear procedural rules.

II. The Fifth Circuit Failed to Properly Apply all of the Equitable Factors. The Undisputed Good Faith Misapplication of a Procedural Rule, Where There is No Prejudice to Casino Rouge or to the Administration of Justice, Weighs Heavily Towards a Finding of Excusable Neglect.

The Fifth Circuit ruling states that "[w]here as here, the rule at issue is unambiguous, a district court's determination that the neglect was inexcusable is virtually unassailable." *Halicki,* 151 F.3d at 470, App. A-10. The Fifth Circuit's ruling dismisses that Casino Rouge would not have been prejudiced by an extension of the time for an appeal, because, "[t]he nature of Halicki's mistake weights heavily against a finding of excusable neglect." *Halicki,* 151 F.3d at 470, App. A-10 - A-11. Thus, *Halicki* improperly concludes that the misconstruction of Rule 6(e) in and of itself outweighs all of the equitable factors of *Pioneer.*

However, application of all of the *Pioneer* factors[7] to

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[7] The failure of the Fifth Circuit to apply all of the *Pioneer* factors is exacerbated by the fact that the trial court did not cite or even address the excusable neglect factors of *Pioneer*. (App.p.A-16 - A-18). A district court's cursory review of the equitable factors in *Pioneer* has at least led to remand in other cases so that the district court can make detailed findings, addressing all of the *Pioneer* factors. See e.g., *Clark*, 51 F.3d. at 44 (where the Fifth Circuit remanded a case to the district court to make a determination of excusable neglect under the equitable factors enunciated in *Pioneer*).

this case weighs heavily in favor of a finding of excusable neglect. *Pioneer* indicates that excusable neglect is measured by several factors, including the prejudice to the non-movant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it is within the reasonable control of the movant, and whether the movant acted in good faith. *Pioneer,* 507 US at 395, 113 S.Ct. at 1498. *(citations ommitted).* The lack of any prejudice to Casino Rouge, the non-movant, or to the interest of efficient judicial administration, combined with the good faith of counsel of Ms. Halicki, weigh strongly in favor of a finding of excusable neglect. See, *Pioneer,* 507 U.S. at 397, 113 S.Ct. at 1499. See also *Brown,* 133 F.3d at 996.

Casino Rouge is not prejudiced by an extension of the time for an appeal. Casino Rouge had no reason to rely on the finality of the judgment where Halicki filed her Rule 59(e) motion a mere twelve days after the entry of judgment. Further, Halicki filed her Supplemental Memorandum, requesting relief under Rule 60(b) and FRAP 4(a)(5) a mere four days after Casino Rouge lodged its procedural objections to her Rule 59(e) Motion. This lack of prejudice weighs heavily in favor of excusable neglest. *Cheney v. Anchor Glass Container Corp.,* 71 F.3d 848 (11th Cir. 1996).

Cheney held that counsel's failure to file a demand for trial de novo within thirty days of an arbitration award, as required by local rule, due to miscommunication within the attorney's office, was "excusable neglect". *Cheney* noted the importance of prejudice stating that "in *Pioneer,* the Supreme Court accorded primary importance to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration in determining whether the district

court had abused its discretion." *Cheney,* 71 F.3d at 850. *Cheney* further reasoned that:

> On balance, the lack of prejudice to [appellee], the minimal degree of delay and the reason therefore, and the lack of impact on the judicial proceedings, when coupled with the lack of bad faith on the part of [movant], require a finding by the district court that the neglect of [movant's] counsel was excusable. The district court's failure to so find and to apply the correct legal standard and factors as announced in *Pioneer* constitute an abuse of discretion.

Cheney, 71 F.3d at 850.[8] *(brackets added).*

In addition, the extension of time would not adversely effect judicial proceedings. Ms. Halicki filed her Rule 59(e) motion a mere twelve days after the judgment was entered. This is not a case where Halicki allowed the appeal delays to run and then sought relief from the judgment. Halicki filed her motion to extend the time for appeal a mere fourteen days after the appeal delays had run on April 4, 1997. Thus, the fundamental purpose of FRAP 4, to protect finality judgments, would not be undermined by an extension of the appeal delays.

Counsel for Halicki made affirmative and good faith efforts to comply with the deadlines both for filing the Rule 59(e) Motion and the deadlines for filing her notice of appeal. The record is undisputed that counsel's actions were in good

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[8] Compare *Cheney* with *Prizevoits,* 76 F.3d at 134 ("We do not think it can make a difference that no harm to the appellee has been shown. It is unlikely ever to be harmed in a Rule 4(a)(5) setting, because a neglectful applicant has only thirty days after the expiration of his time for appealing in which to request relief.").

faith reliance on Rule 6(e). The very fact that the motion was filed two days late, supports and corroborates good faith reliance on Rule 6(e). Counsel for Halicki filed her motion to extend the appeal delays a mere four days after learning of Casino Rouge's claim that the Rule 59(e) motion may not have suspended the time for appeal. Counsel for Halicki did not intentionally flout or ignore court deadlines. Rather, at every state of litigation, counsel for Halicki made an affirmative good faith effort to comply with the deadlines.

Further, the Fifth Circuit's characterization of counsel's error as failing to apply a clear and "unambiguous" rule of procedure is questionable in light of the multitude of cases in which Rule 6(e) has been misapplied by both federal judges and attorneys. See, *Williams, supra* (attorney error); *Kyle, supra*, (same); *Parker v. Board of Public Utilities of Kansas City, Kan.*, 77 F.3d 1289 (10th Cir. 1996)(same); *Derrington-Bey v. District of Columbia, Dept. of Corrections*, 39 F.3d 1224 (U.S. App. DC 1995)(same); *Adams v. Trustees of the New Jersey Brewery Employees Pension Trust Fund*, 29 F.3d 863 (3rd Cir. 1994)(same); *Mattson v. Brown University*, 925 F.2d 529, 532 (1st Cir. 1991)(where the First Circuit had to reverse a trial court's decision that allowed the defendant to add three extra days for filing a bill of costs under the mail rule); and *Automated Facilities, Inc. v. American Auto-Matrix, Inc.*, 1995 W.L. 584330, (N.D., Ill. 1995)(where district court judge misapplied Rule 6(e) to a Rule 59(e) motion stating, "Moreover, the docket indicates that notice of entry of judgment was mailed to the parties, so three days must be added to the period.") Since this error still occurs in federal practice, a hard and fast rule that misapplication of the mail Rule 59(e) can never be excusable neglect, should be rejected.

Excusable neglect is a standard that requires "proportionality." See, *Brown*, 133 F.3d at 997. The refusal to find excusable neglect deprived Ms. Halicki of her right to subject the adverse summary judgment decision to de novo review, rather than abuse of discretion standard. De novo review could have resulted in a reversal of the summary judgment. The district court improperly required Halicki to establish "whether it is more likely than not that defendant's actions were based on illegal discriminatory criteria." (District Court's ruling, App. A-25). The standard for summary judgment in Title VII cases is not whether the decision was "more likely than not" unlawfully motivated, but whether there was "substantial evidence" from which rational jurors could infer discrimination. See, *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, at 449-450 (5th Cir. 1996). The district court compounded its error when it rejected the evidence of disparate treatment. See, *Portis v. First Nat. Bank of New Albany, Miss.*, 34 F.3d 325, at 331 (5th Cir. 1994)(whether discrimination should be inferred from disparate treatment is "an issue of credibility and consequently falls grounded within the province of the jury".).[9]

Simply put, the deprivation of Ms. Halicki's right to have a jury decide whether to infer discriminatory motive from the disparate treatment and effectively deprive her of her right to a jury trial is too great of sanction. Counsel for

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[9] At the summary judgment stage Halicki submitted evidence of disparate treatment indluding evidence that: (1) she was terminated because she was counseling a male employee concerning the fact that the General Manager was having an affair with an employee's wife; where other male employees who also counseled the employee were not terminated; and (2) unlike another male employee's termination, Halicki was escorted off the property and was required to sign a waiver of any rights for legal redress from Casino Rouge. (TR, Vol. 4, pp. 413-416 and 416-417, respectfully).

Halicki's mistake has happened to numerous attorneys and judges in federal practice and there is no prejudice to Casino Rouge. See, *Brown*, 133 F.3d at 997, citing *Lorenzen v. Employees Retirement Plan of the Sperry and Hutchinson Co. Inc.*, 896 F.2d 228, 232-33 (7th Cir. 1990)("If the mistake is slight, non-prejudicial, easily understandable, can happen to the best of us, etc., then dismissal of the appeal, with prejudice, may be an excessive sanction"). Therefore, the Fifth Circuit erred in finding that the misconstruction of Rule 6(e) could not be excusable neglect.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari of Ms. Halicki should be granted.

Respectfully submitted:

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Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-30508

FILED
OCT 2 1998

MARY CAROLE HALICKI

Plaintiff - Appellant

v.

LOUISIANA CASINO CRUISES, INCORPORATED; ARTHUR FRANK

Defendants

LOUISIANA CASINO CRUISES, INCORPORATED, doing business as Casino Rouge Carnival Corporation

Defendant - Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING

Before JOLLY, SMITH and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is **DENIED**.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-30508

FILED
SEP 01 1998

MARY CAROLE HALICKI,

Plaintiff-Appellant,

VERSUS

LOUISIANA CASINO CRUISES, INC;
ARTHUR FRANK,

Defendants,

LOUISIANA CASINO CRUISES, INC.,
d/b/a Casino Rouge Carnival Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana

Before JOLLY, SMITH and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Mary Halicki appeals adverse rulings in her lawsuit for employment discrimination. We affirm.

I.

Halicki worked for defendant Louisiana Casino Cruises, Inc., doing business as Casino Rouge, and was terminated. She sued under title VII, claiming that her termination was the result of sex discrimination.

The district court granted Casino Rouge's motion for summary judgment, and entered final judgment on March 5, 1997. Under FED. R. APP. P. 4 (a) (1), Halicki had thirty days therefrom in which to file notice of appeal.[1] She counted on filing a timely motion under FED. R. CIV. P. 59 (e), however, which would have the effect of suspending the thirty-day period. See FED. R. APP. P. 4 (a) (4) (C).

Halicki's counsel claims that because he received notice of the final judgment by mail, he thought the three-day mail service provisions of FED. R. CIV. P. 6 (e) applied to enlarge the ten days he otherwise would have from the entry of final judgment to file a rule 59 (e) motion. Apparently unaware that the plain language of the rules, well-settled hornbook law, and every other circuit to address the issue had rejected the applicability of rule 6 (e) to rule 59 (e), the attorney waited until the tenth day to mail the rule 59 (e) motion, causing it to arrive at the district court two days late.

Casino Rouge, in its opposition to the rule 59 (e) motion, objected to its untimeliness. Halicki moved for enlargement of time for filing a notice of appeal under FED. R. APP.

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[1] "A timely notice of appeal is necessary to the exercise of appellate jurisdiction." *United States v. Cooper*, 135 F.3d 960, 961 (5th Cir. 1998) (citing *United States v. Robinson*, 361 U.S. 220, 224 (1960)).

P. 4 (a) (5) because of "excusable neglect" in misconstruing rule 6 (e); for, if her rule 59 (e) motion was untimely, the thirty-day notice of appeal clock did not toll, and her time to appeal had expired. *See Gribble v. Harris,* 625 F.2d 1173, 1174 (5th Cir. Unit A 1980) (per curiam); FED. R. APP. P. 4 (a) (4). Halicki also argued that even if the rule 59 (e) motion was untimely, the court should construe it as a FED. R. CIV. P. 60 (b) motion for relief from judgment. The district court denied, and Halicki timely appealed, the denial of her rule 59 (e), rule 4 (a) (5), and rule 60 (b) motions.

II.

Rule 6 (e), FED. R. CIV. P., provides: "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period *after the service of a notice* or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period." (Emphasis added.) "Mere quotation of Rule 6 (e) shows why it is inapplicable to Rule 59 (e) motions. The period for filing a Rule 59 (e) motion does not—in the words of Rule 6 (e)—begin with 'service of a notice.' " *Derrington-Bey v. District of Columbia Dep't of Corrections,* 39 F. 3d 1224, 1225 (D.C. Cir. 1994).[2] Rather, rule 59 (e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days *after entry of the judgment.*"

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[2] All other circuits to have addressed this issue have found that rule 6 (e) does not apply to rule 59 (e) motions. *See Parker v. Board of Pub. Utils.,* 77 F. 3d 1289, 1291 (10th Cir. 1996) (holding the same); *Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund,* 29 F. 3d 863, 870 (3d Cir. 1994) (same); *Flint v. Howard* 464 F. 2d 1084, 1087 (1st Cir. 1972) (per curiam) (on petition for rehearing); *cf. Cavaliere v. Allstate Ins. Co.,* 996 F. 2d 1111, 1113-14 (11th Cir. 1993) (rejecting the application of rule 6 (e) to a motion filed under rule 59 (b)).

(Emphasis added.)

"Rule 6 (e) does not apply to time periods that begin with the filing in court of a judgment or an order. Thus, Rule 6 (e) does not apply to the 10-day period that runs from entry of judgment for moving to alter or amend judgment pursuant to Rule 59 (e)." 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 6.05 [3], at 6-35 (3d ed. 1998) (citations omitted). Under the plain language of the rules, therefore, the district court correctly found that Halicki's rule 59 (e) motion was untimely filed two days after the tenth day from entry of judgment.

III.

Halicki argues that even if she misapplied rule 6 (e), her construction of the rules in this instance—an issue of first impression in this circuit—should constitute "excusable neglect" under rule 4 (a) (5). Thus, she argues, the district court should have granted her an extension to file a notice of appeal on the underlying summary judgment.

Rule 4 (a) (5) provides: "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4 (a)." Accordingly, we face three issues: (1) what the correct standard is for the evaluation of "excusable neglect"; (2) whether the court employed the correct standard in evaluating "excusable neglect"; and (3) whether, if the court used the correct standard, it reached a tenable result.

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*

Partnership, 507 U.S. 380, 395-97 (1993), the Court interpreted "excusable neglect" in the context of the bankruptcy rules. It stated:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account all of the relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395.

We have adopted the *Pioneer* standard of "excusable neglect" for purposes of FED. R. APP. P. 4 (b), which governs *criminal* matters. *See United States v. Clark,* 51 F. 3d 42, 43-44 (5th Cir. 1995). Like rule 4 (a) (5), rule 4 (b) provides that "[u]pon a showing of excusable neglect, the district court may . . .extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

In *Clark,* defense counsel, not unlike Halicki's attorney, misconstrued the federal criminal rules and their applicability to the amount of time the defendant had to file his notice of appeal. *See Clark,* 51 F.3d at 42-43. The district court found that our caselaw interpreting FED. R. APP. P. 4 prohibited

such conduct from ever constituting "excusable neglect." *See id.* at 43. On appeal, we disagreed, holding that the intervening decision in *Pioneer* abrogated our previous caselaw stringently construing "excusable neglect" in rule 4 (b). We noted that under the new, more liberal *Pioneer* standard, the district court *could*—in its discretion—find that Clark's attorney's misreading of the rule constituted "excusable neglect." *See id.* at 44.

We specifically declined, however, to order the district court, on remand, to find that counsel's conduct *must* constitute "excusable neglect." *See id.* ("[W]e do not hold that it would be an abuse of discretion for the district court, on remand, to find no excusable neglect on these facts."). Indeed, we noted, from *Pioneer,* that a misconstruction of the rules—especially when their language is plain—will rarely satisfy the "excusable neglect" standard. *See Pioneer,* 507 U.S. at 392 ("[I]gnorance of the rules (and) mistakes construing the rules do not usually constitute 'excusable' neglect."); *see also Clark,* 51 F.3d at 44 (noting the same in the context of that case).

We first must determine whether the reasoning in *Clark* applies, as well, to rule 4 (a) (5)—that is, to *civil* cases. Although we could make distinctions between the civil and criminal spheres, the argument for applying the *Pioneer* interpretation to the civil context is fairly conclusive.

First, both rule 4 (a) (5) and rule 4 (b) use "excusable neglect" as the standard for an extension of the time for filing a notice of appeal. We are mindful of the "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drill-*

ing Co., 505 U.S. 469, 479 (1992) (citations omitted).

Second, the Pioneer Court's construction of "excusable neglect" was apparently generally applicable, as the Court claimed to be adopting "the commonly accepted meaning of the phrase." *Pioneer*, 507 U.S. at 391. For this reason, courts of appeals have readily found the standard applicable to rule 4(a)(5), *see, e.g., Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 533 (4th Cir. 1996), as well as to rule 4 (b), *see Clark*, 51 F.3d at 43-44.

Finally, *Pioneer* was a civil bankruptcy proceeding, in which the Court noted that the circuits "similarly have divided" over the term of "excusable neglect" in the context of rule 4 (a) (5). *See Pioneer*, 507 U.S. at 387 n.3. We therefore read the Court's opinion, by its own terms, to cover this issue.[3]

Proceeding under the *Pioneer* standard, we face the harder question of how the district court made its "excusable neglect" inquiry. That is, we must decide whether it used

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[3] In extending *Pioneer* to rule 4 (a) (5), we follow each of our sister circuits to have addressed the issue. *See Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1323 (11th Cir. 1996) (per curiam); *Thompson*, 76 F.3d at 533 ("While in *Pioneer* the Court interpreted the phrase 'excusable neglect' as used in a rule of bankruptcy procedure, it is evident that the Court intended its definition of 'excusable neglect' to be equally applicable to Federal Rule of Appellate Procedure 4 (a) (5), as every appellate court to consider the applicability of *Pioneer* to Rule 4 (a) (5) and Rule 4 (b) (criminal appeals) has concluded,"); *Fink v. Union Cent. Life Ins. Co.*, 65 F.3d 722, 724 (8th Cir. 1995); *Reynolds v. Wagner*, 55 F.3d 1426, 1429 (9th Cir. 1995); *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 454 n.3 (1st Cir. 1995); *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994).

the *Pioneer* standard, or instead employed the older, more stringent metric in making its "excusable neglect" determination. If we conclude that the court used the *Pioneer* standard, we must then decide whether it did so correctly.

Halicki does not appear to have proffered any standard of "excusable neglect" to the district court. Instead, she argued there, as here, that *Pioneer* and *Clark* hold that misconstruction of procedural rules *necessarily* should result in a finding of "excusable neglect" where no prejudice results to the opposing party. The court correctly disagreed with this proposition, *see Pioneer,* 507 U.S. at 392, and without discussing its reasoning further, denied the motion for extension of time to file notice of appeal.

It appears, however, that the court considered all evidence Halicki proffered in support of her claim and made an equitable determination that an extension was unwarranted. Under *Pioneer* and *Clark,* no more is required.[4]

Turning to the district court's application of the *Pioneer* standard to the facts of this case, we detect no error. The nature of Halicki's mistake weighs heavily against a finding of excusable neglect.[5]

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[4] Halicki argues that granting an extension would cause no prejudice to Casino Rouge. Given this showing alone, however, the district court was justified in finding that counsel's misconstruction of the rules was not "excusable" neglect; "The work 'excusable' would be read out of the rule if inexcusable neblect were transmuted into excusable neglect by a mere absence of harm." *Prizevoits v. Indiana Bell Tel. Co.,* 76 F.3d 132, 134 (7th Cir. 1996).

[5] *See Advanced Estimating Sys., Inc. v. Riney,* 130 F.3d 996, 998 (11th Cir. 1997) (mistaken interpretation or ignorance of FED. R. APP. P. 4 (a) (4) (F)); *Prizevoits v. Indiana Bell Tel. Co.,* 76 F.3d 132, 134 (7th Cir. 1996)

Although in *Clark* we left open the possibility that some misinterpretations of the federal rules may qualify as excusable neglect, such is the rare case indeed. Where, as here, the rule at issue is unambiguous, a district court's determination that the neglect was inexcusable is virtually unassailable. Were it otherwise, "almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline." *Riney*, 130 F.3d at 998. Accordingly, we cannot say that the court abused its discretion in denying Halicki's motion to extend the notice of appeal clock under rule 4 (a) (5).

IV.

The only issue before us, therefore, is whether the district court properly disposed of Halicki's motion under rule 60 (b) for relief from judgment because of her newly "discovered" (or proffered) evidence and because of the district court's alleged mistake of law at summary judgment. "A 'timely' appeal from a 'ruling on a Rule 60 (b) motion' may be taken under FED. R. APP. P. 4 (a) (5), although the court of appeals 'may review the ruling only for abuse of discretion' and although the appeal 'does not bring up the underlying judgment for review.' " *Derrington-Bey*, 39 F.3d at 1226 (quoting *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978)).

"[T]he decision to grant or deny relief under Rule 60 (b)

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footnote 5 continued
(mistaken interpretation or ignorance of FED. R. CIV. P. 6 (b)); *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931-32 (9th Cir.) (mistaken interpretation of FED. R. CIV. P. 6 (e)), *cert. denied*, 513 U. S. 867 (1994); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994) (mistaken interpretation of FED. R. APP. P. 4 (a) (4)).

lies within the sound discretion of the district court and will be reversed only for abuse of that discretion." *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc). "Furthermore, we have repeatedly held that in order to prevail on a motion under FED. R. CIV. P. 60 (b) (2) based upon newly presented evidence, the movant must demonstrate among other things that it exercised due diligence in obtaining the information." *William v. Chater*, 87 F.3d 702, 705 n.2 (5th Cir. 1996) (citing *Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 771 (5th Cir. 1995); *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1199 (5th Cir. 1993)).

Casino Rouge initially opposed Halicki's rule 60 (b) motion because it was originally filed as an untimely rule 59 (e) motion. Casino Rouge argues that Halicki was required to file a separate rule 60 (b) motion for the lower court to consider it as such; that is, Casino Rouge argues that Halicki could not use her untimely rule 59 (e) motion as a motion under rule 60 (b).

Casino Rouge's argument in this regard cuts against the grain of the liberal Federal Rules of Civil Procedure. "As with untimely Rule 52 (b) motions, and untimely Rule 59 (a) motions, a court may treat an untimely rule 59 (e) motion to alter or amend the judgment as if it were a Rule 60 (b) motion if the grounds asserted in support the Rule 59 (e) motion would also support Rule 60 (b) relief." 12 MOORE ET AL., *supra*, § 60.03 [4], at 60-24.[6] Here, the grounds

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[6] *See Damiano v. FDIC*, 104 F.3d 328, 332 n.4 (11th Cir. 1997) (noting the same); *Edwards*, 78 F.3d at 995 (same); *Helm v. Resolution Trust Corp.*, 43 F.3d 1163, 1166-67 (7th Cir. 1995) (same).

Halicki asserted in her rule 59 (e) motion—new evidence and mistake—would also support a rule 60 (b) motion.

Halicki contends that having properly considered the rule 60 (b) motion, the district court was required to pay special solicitude to her claim because she never had an "examination of the full merits of the cause," which, in her view, means a trial. Indeed, "where denial of relief [under rule 60 (b)] precludes examination of the full merits of the cause, even a slight abuse of discretion may justify reversal." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. Unit A Jan. 1981) (citation omitted).

Our caselaw allows for more leniency in opening up *default* judgments, not those in which the court has had a chance to evaluate the merits. *See, e.g., Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1459 (5th Cir. 1991); *see also* 12 MOORE ET AL., *supra*, § 60.22 [3] [a], at 60-69 to 60-70. "Summary judgment is a judgment on the merits; it has the same effect as if the case had been tried by the party against whom judgment is rendered and decided against him." "*Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir. 1985). Accordingly, we reject Halicki's invitation to conduct a more searching review and instead give our usual deference to the district court's denial of rule 60 (b) relief. *See Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1082 (5th Cir. 1984) (reviewing a denial of a rule 60 (b) motion for abuse of discretion).

To the extent that the "newly discovered" evidence is grounds for Halicki's rule 60 (b) motion, Halicki has made no showing that the evidence in the newly proffered affidavits was "newly discovered," in that it was not obtainable prior

to summary judgment had she exercised "due diligence." Indeed, all but one of the supplemental affidavits proffered with the rule 60 (b) motion were from the *same* witnesses who had offered affidavits before summary judgment. The refusal to grant rule 60 (b) relief on this paltry showing of "newly discovered" evidence was certainly not an abuse of the court's equitable powers to reopen the judgment.

Halicki's second theory for rule 60 (b) relief—that the district court applied the wrong legal standard at summary judgment—is not one that readily fits within one of the enumerated grounds for relief outlined in the rule. Although it arguably could fall within the scope of rule 60 (b) (1), mistake,[7] or rule 60 (b) (6), the "catch-all" provision, it should not, in this case, because the ground—the district court's error of law—appears to be no more than a mask for Halicki's forfeited appeal of the court's summary judgment ruling.[8]

"Rule 60 (b) is not a substitute for a timely appeal. Courts should not grant relief when the moving party has not been diligent in protecting its own rights by filing an appeal from an adverse judgment." 12 MOORE ET AL., *supra*, § 60.22 [2], at 60-67.[9] Even assuming *arguendo* that the

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[7] A rule 60 (b) challenge on this ground is usually thought to encompass "an obvious error of law." *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (5th Cir. 1987). The alleged error in this case is not such a mistake.

[8] *See, e.g., Travelers Indem. Co. v. United States*, 728 F.2d 699, 703 (5th Cir. 1984) ("Although Travelers uses the war-weary rhetorical epithet of 'manifest' or 'beyond question' in depicting the claimed error, the briefs demonstrate at best only that the question is arguable.").

[9] *See Pryor v. United States Postal Serv.*, 769 F.2d 281, 288-89 (5th Cir. 1995) (noting that "[w]ere this Court to make an exception to finality of

district court made an error of law at summary judgment, it had the discretion to deny Halicki's rule 60 (b) motion to prevent her end-run of the normal appellate process for correcting legal error.

AFFIRMED.

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footnote 9 continued

judgment each time a hardship was visited upon the unfortunate client of a negligent or inadvertent attorney, even though the result be disproportionate to the deficiency, courts would be unable to ever adequately redraw that line again, and meaningful finality of judgment would largely disappear").

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

FILED
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MARY CAROLE HALICKI

CIVIL ACTION

VERSUS

NO. 95-1957-A

LOUISIANA CASINO CRUISES, INC.
d/b/a CASINO ROUGE, ET AL

RULING ON MOTIONS

This matter is before the court on a motion by plaintiff to alter or amend this court's judgment of March 5, 1997. Defendants oppose the motion on the basis that it is untimely. Plaintiff also has filed a motion to extend the time for filing of a notice of appeal pursuant to Fed. R. App. P. 4(a)(5). This court has federal question jurisdiction based on 42 U.S.C. §2000e-5f and 28 U.S.C. § 1343(a)(4).

Discussion

Plaintiff filed suit on November 29, 1995 alleging defendants had violated Title VII of the Civil Rights Act of 1964. On March 4, 1997, this court granted defendants' motion for summary judgment and entered judgment in favor of defend-

ants on March 5, 1997. On March 21, 1997, plaintiff filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e).

Rule 59(e) reads: "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 6(a) directs how the time period is to be computed and provides in pertinent part:

> the day of the act from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. . .When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Pursuant to Rule 6(a), March 19, 1997 was the last day for plaintiff to timely file her motion to amend the judgment. Plaintiff does not argue that she filed her motion to amend within the ten days allowed, but argues that Fed. R. Civ. P. 6(e) applies, extending the time for which plaintiff could file. Rule 6(e) provides:

> [w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party by mail, 3 days shall be added to the prescribed period.

The court agrees with defendants that the motion is untimely and must be denied. Under Rule 59(e) the time to move runs from the "entry of judgment," not from the time

parties receive notice. Moreover, Rule 6(e) is inapplicable because the court's judgment was not the subject of "service," whether or not the mails were used to transmit the judgment from the Clerk to a party.

Plaintiff also filed an alternative motion to extend the time for filing of a notice of appeal pursuant to Fed. R. App. P. 4(a)(5) in the event the court would find her motion to alter or amend the judgment untimely. Rule 4(a)(5) provides:

> [t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a) [4(a) requires a notice of appeal to be filed with the clerk of the district court within 30 days after the date of entry of judgment].

Plaintiff's counsel argues that the calculation of the post-trial motion was in good faith and justified and therefore is excusable neglect. The court finds that neither excusable neglect or good cause exist. Furthermore, the court declines to grant relief from the court's judgment as requested by plaintiff under Fed. R. Civ. P. 60(b).

Accordingly, plaintiff's motions are hereby DENIED.

Baton Rouge, Louisiana, May 2, 1997.

/s/ John V. Parker

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX D

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

FILED
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MARY CAROLE HALICKI

CIVIL ACTION

VERSUS

NO. 95-1957-A

LOUISIANA CASINO CRUISES, INC.
d/b/a CASINO ROUGE and
CARNIVAL CORPORATION,
and ARTHUR FRANK

RULING ON MOTIONS

This matter is before the court on a motion of defendant, Louisiana Casino Cruises, Inc. d/b/a Casino Rouge for summary judgment and to strike affidavits filed by plaintiff in opposition to defendant's motion for summary judgment. Plaintiff, Mary Carole Halicki, opposes the motions. Also pending before the court is plaintiff's motion for stay of magistrate's order re-opening discovery. Defendant opposes the motion. Federal question jurisdiction is allegedly based on 42 U.S.C. §2000e-5f and 28 U.S.C. § 1343(a)(4).

Background

Plaintiff began working for Casino Rouge on May 9,

1994 as Marketing Manager, Arthur Frank, the general manager at all times-relevant, had offered plaintiff the position of Marketing Manager for Casino Rouge with a $50,000 per annum salary. Casino Rouge employed plaintiff continuously in this position until May 4, 1995 when she was informed by Frank that her position had been terminated. Plaintiff filed suit alleging that Casino Rouge's actions toward plaintiff violated Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. §2000e-2(a).[1] A "right-to-sue" letter has been issued to plaintiff.

Arguments

Plaintiff claims that defendant discriminated against her on the basis of gender with respect to her compensation, terms, conditions, and privileges of employment and with respect to her discharge. Defendant first argues that plaintiff's Charge of Discrimination filed with the Equal Employment Opportunity Commission (EEOC) limits this action to discriminatory discharge and does not include a claim for discrimination with respect to her compensation, terms, conditions, and privileges of employment. Defendant asserts that with respect to plaintiff's allegation of discriminatory discharge, the reason for discharge was a non-discriminatory one. Defendant claims plaintiff was terminated as part of a reorganization of the marketing department at Casino Rouge.

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[1] 42 U.S.C. §2000e-2(a) provides:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Law

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. **Celotex Corp. v. Catrett,** 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. The court must resolve all factual inferences in favor of plaintiff. **Abbott v. Equity Group, Inc.** 2 F.3d 613 (5th Cir. 1993).

A. The Scope of Plaintiff's EEOC Charge

As mandated by Title VII, plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) before filing this action. A preliminary issue, therefore, is the scope of plaintiff's EEOC charge.

A Title VII judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. **Sanchez v. Standard Brands, Inc.,** 431 F.2d 455 (5th Cir. 1970). The administrative charge requirement serves the important purposes of giving the charged party notice of the claim and "narrowing the issues for prompt adjudication and decision."

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[2] Fed. R. Civ. Pro. 56(c)

Park v. Howard University, 71 F.3d 904, 907 (D.C. Cir. 1995).

The Plaintiff's EEOC charge reads:

> I believe that my termination was motivated by, and the result of discrimination against me because of my sex, female, and in retaliation for opposing practices made unlawful under Title VII of the Civil Rights Act of 1964, as amended.
>
> At the time of my termination, the General Manager informed me that my dismissal was due to a reorganization of the Marketing Department. This proffered excuse for my termination was merely a pretext for my unlawful termination. Indicative of Respondent's unlawful animus towards female employees is the all male composition of Respondent's Executive (operations) Committee to which I and other women employees were denied membership.

Defendant argues that the only employment decision complained in plaintiff's EEOC charge was her termination. Plaintiff's charge cites May 4, 1995 (the date of her termination) as both the "earliest" and "latest" date of the alleged discrimination and did not check the "continuing action" option regarding the date of discrimination.

Plaintiff argues that the statements in her charge directly expresses, or at the very least implicates, discrimination against her "with respect to her compensation, terms, conditions and privileges of employment. Plaintiff argues that within the expressed words of the EEOC charge Ms. Hailcki alleges that Casino Rouge discriminated against women in

selecting its Executive (Operations) Committee.

Discussion

Courts should not strictly interpret the scope of an EEOC complaint, but should liberally construe the complaint. **Sanchez** at 465. This rule is based on the conclusion that most of the charges filed with the EEOC are prepared by people without legal training and without the assistance of counsel. **Ghahramani v. BASF Corp.,** 755 F. Supp 708 (M.D. La. 1991).

A court, however, cannot allow liberal interpretation of an administrative charge to permit a litigant to bypass the Title VII administrative process.. **Park** at 907. The goals behind the prior resort to administrative relief would be frustrated if the filing of a formal charge with the EEOC would open up the possibility of judicial challenges to any related conduct that took place in connection with the employment relationship. **Id.** at 908.

The court finds that, however read, Ms. Halicki's charge does not include a claim for discrimination against Ms. Halicki with respect to her compensation, terms, conditions, and privileges of employment was because of her sex, female.

B. Prima Facie Case of Discrimination in Discharge

In a typical disparate treatment discharge case, the plaintiff must prove a prima facie case of discrimination by showing that (1) he is a member of a protected group; (2) he was qualified for the job that he held; (3) he was discharged; and (4) after his discharge, his employer filled the position

with a person who is not a member of the protected group. **Vaughn v. Edel,** 918f.2d 517, 521 (5th Cir. 1990). Where plaintiff presents a prima facie case, the employer must rebut the presumption of gender discrimination by articulating a legitimate non-discriminatory reason for the adverse employment action. If the defendant proffers a non-discriminatory reason, plaintiff can avoid summary judgment by presenting evidence which when taken as a whole, (1) creates a fact issue as to whether the employer's stated reasons were what actually motivated the employer and (2) creates a reasonable inference that gender was a determinative factor in the employment actions in question. **Atkinson v. Denton Publishing Company,** 84 F.3d 144, 149 (5th Cir. 1996).

Discussion

Because plaintiff does not have evidence of the fourth factor, defendant argues that plaintiff cannot establish a prima facie case. Proof, however, that the defendant filled plaintiff's position with a person who is not a member of the protected group is not the only way to establish an unlawful inference of discrimination. **Jones v. Western Geophysical Company of America,** 669 F. 2d 280, 284 (5th Cir. 1982). All that plaintiff need do is prove by a preponderance of the evidence that she was discharged from the position from which she was qualified "under circumstances" which give rise to an inference of unlawful discrimination. The underlying purpose of the fourth element is to establish an unlawful inference of discrimination. But proof that the employer replaced the fired minority employee with a nonminority employee is not the only way to create such an inference. **Id.** The court will examine all of the evidence that has been adduced for other indicia of discrimination relating to plain-

tiff's discharge and determine whether it is more likely than not that the defendant's actions were based on illegal discriminatory criteria.

Plaintiff produced numerous affidavits to demonstrate that the employer intended to discharge her because of her gender. The essence of these affidavits is that plaintiff's two immediate superiors, General Manager Art Frank and VicePresident and Director of Marketing, J. Carroll Cotten displayed a sexist attitude toward women employees at Casino Rouge in positions of responsibility including towards plaintiff and others.

With respect to Cotten, the affidavits provide general allegations that Cotten would defer to male employee's opinions, but never to the opinions of women employees, and that Cotten made numerous derogatory remarks concerning the working abilities of Casino Rouge women employees. The affidavits provide general allegations that Cotten resented plaintiff as a female manager and took every opportunity to criticize her and limit her job responsibilities as he was threatened by her. According to the affiants, they were of the opinion plaintiff's termination was on the basis of her sex, female, in that both Cotten and Frank treated her differently than male managers whom they supervised.

These general allegations are insufficient for demonstrating an inference necessary to show defendant's actions were based on illegal discriminatory criteria. Even in discriminatory discharge cases, where the plaintiff can rarely present direct, subjective evidence of an employer's actual motive, the plaintiff cannot survice summary judgment with unsupported allegations and speculations, but

rather must point to specific facts detailed in affidavits and depositions, that is, names, dates, incidents, and supporting testimony, giving rise to an inference of discriminatory animus. **Hoeppner v. Crotched Mountain Rehabilitation Ctr.**, 31 F. 3d 9 (1st Cir. 1994). Plaintiff has failed to do this with respect to her allegations against Cotton.

Plaintiff produces affidavits with the same general allegations against Frank as with Cotten. For instance, plaintiff refers to the affidavit of Debi Ball, the former Casino Rouge Marketing Coordinator. Ms. Ball states that Frank, despite his status as General Manager, evaluated women on what they could do for him socially, or otherwise treated women as second class employees. Again, such general opinions are insufficient.

Plaintiff does provide some fact specific evidence in an effort to demonstrate discriminatory discharge. Plaintiff argues:

> substantial evidence exists which supports that one of the reasons Frank dismissed Ms. Hailcki was in retaliation for her counseling of Casino Rouge employee Jim Vambaketes concerning the fact that Frank was having an illicit affair with Casino Rouge employee Kari Vambaketes, Jim's wife.

Plaintiff argues that this action by Frank was sex-based discrimination due to the fact that several male Casino Rouge managers also counseled Jim Vambaketes but were not similarly dismissed nor were they even disciplined. Plaintiff points to an affidavit of Donna Koester, Casino Rouge's former Secretary/Treasurer and Project Coordinator, who

stated in her deposition that she doubted that Halicki was let go as a result of a marketing re-structuring. Based upon her working relationship with Art Frank, Ms. Koester "felt that" (was of the opinion that) Art Frank 'restructured' the department as a convenient excuse for covering up his relationship with Kari Vambaketes.

Even assuming that the real reason Art Frank terminated plaintiff was because plaintiff counseled Jim Vambaketes, this alone would not infer gender based discrimination, even if other male employees weren't fired for counseling Jim Vambaketes.[3] An employer may discharge an employee for a good reason, mistaken reason, or no reason at all and will not violate Chapter VII as long as the decision is not based on gender.

The court finds that plaintiff has failed to set forth substantial evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions. A mere scintilla of evidence is insufficient to present a question for the jury. **Rhodes v. Gulberson Oil Tools,** 75 F. 3d 989,993 (5th Cir. 1996) (quoting **Boeing Co. v. Shipman,** 411 F. 2d 365 (5th Cir. 1969) (en banc)).

Moreover, even if the court assumed plaintiff has set out a prima facie case, in order to avoid summary judgment,

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[3] Plaintiff asserts that defendant's treatment of her upon dismissal was in sharp contrast to that of another male Casino Rouge employee, Nigel White. Plaintiff refers to the manner in which she was dismissed in which she alleges she was escorted off of the property, was barred from the property and had to sign a waiver for any rights she had for legal redress from Casino Rouge.

plaintiff must carry the burden of production and show that there is evidence that the non-discriminatory reason for her termination is pretextual, i.e. that the real reason for discharge was plaintiff's gender. In order to do this, plaintiff would have to overcome the "same actor" inference.[4] **Walker v. Southern Holdings, Inc.** 934 F. Supp. 197,199 (M.D. La. 1996). The "same actor" inference arises where a plaintiff was terminated by the same person or persons who hired her and creates an assumption that gender discrimination was not the motive behind the termination. **Id.** As recognized by the Fifth Circuit in **Brown v. CSG Logic, Inc.**, 82 F. 3d 651 (5th Cir. 1996), the Fourth Circuit best enunciated the rationale for this inference in **Proud v. Stone** saying that:

> [c]laims that employer animus exists in termination but not in hiring seem irrational.' From the standpoint of the putative discriminator, '[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.'[5]

Applying the "same actor" inference to the allegations set forth in the complaint, an inference arises that plaintiff's discharge was not motivated by plaintiff's gender. Plaintiff alleges that in the early months of March 1994, Art Frank contacted plaintiff multiple times concerning her possible employment with Casino Rouge and subsequently offered

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[4] Plaintiff alleges Art Frank hired and fired her. See Complaint par. 2 and 22.

[5] **Proud v. Stone**, 945 F.2d 796, 797 (4th Cir. 1991).

plaintiff the position of Marketing Manager.[6] Plaintiff claims that one year later Frank called plaintiff into a meeting, and in a very hostile, belligerent and offensive manner, informed her that her position had been terminated effective immediately based on an alleged reorganization of the marketing department.[7]

The court finds that plaintiff has failed to present a prima facie case of gender discrimination. Defendant's motion for summary judgment is hereby GRANTED and judgment shall be entered in favor of defendant. All other motions pending before the court are rendered moot.

Baton Rouge, Louisiana, March 3, 1997.

/s/ John V. Parker

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

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[6] Complaint, paragraphs 2,3.

[7] Complaint, paragraphs 20-22.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

FILED
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MARY CAROLE HALICKI

CIVIL ACTION

VERSUS

NO. 95-1957-A

LOUISIANA CASINO CRUISES, INC.
d/b/a CASINO ROUGE and CARNIVAL
CORPORATION and ARTHUR FRANK

J U D G M E N T

For the written reasons assigned and filed herein.

IT IS ORDERED ADJUDGED AND DECREED that the motion for summary judgment filed on behalf of defendants is hereby GRANTED and this action is hereby DISMISSED.

Baton Rouge, Louisiana, March 5, 1997.

/s/ John V. Parker

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX E

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or

(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2). 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

[(c) Rescinded Feb. 28, 1966, eff. July 1, 1966]

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail.
Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

APPENDIX F

FRAP 4. APPEAL AS OF RIGHT— WHEN TAKEN

[Effective until December 1, 1998 absent contrary Congressional action. See, also, amended rule, post.]

(a) Appeal in a Civil Case.

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last

expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the

above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning

of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeal in a Criminal Case. In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order—but before entry of the judgment or order—is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal;

(2) for arrest of judgment;

(3) for a new trial on any ground other than newly discovered evidence; or

(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or

until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may—before or after the time has expired, with or without motion and notice—extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed.R.Crim.P. 35(c), nor does the filing of a motion under Fed.R.Crim.P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(c) Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal

is filed in the manner provided in this subdivision (c), the 14—day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30—day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1738
Summary Calendar

FILED
SEP 08 1994

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

JOE EVBUOMWAN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR3-92-124-P)

(September 8, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Joe Evbuomwan appeals the sentence he received after

[1] Local Rule 47.5.1provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

pleading guilty to credit card fraud, in violation of 18 U.S.C. § 1341. And, the United States challenges the district court's ruling, on remand from this court, that Evbuomwan's counsel's failure to timely file a notice of appeal was excusable neglect. We find no abuse of discretion in the excusable neglect ruling, and **AFFIRM** the sentence.

I.

Evbuomwan pleaded guilty to one count of credit card fraud in 1992. For sentencing, the district court relied on U.S.S.G. § 1B1.3 (defendant responsible for reasonably foreseeable acts of others taken in furtherance of jointly undertaken criminal activity), to determine that the loss attributable to Evbuomwan was $90,471. At least $66,000 of that loss was attributable to a check fraud scheme perpetrated against NCNB Bank by two of Evbuomwan's associates (Michael Aakhideno and Mark Dorenuma); no criminal charges were brought against Evbuomwan with regard to that scheme. Evbuomwan was sentenced, *inter alia*, to 18 months imprisonment.

On direct appeal, this court determined that the district court misapplied the guidelines by failing to determine: whether Evbuomwan agreed jointly to undertake criminal activity with Aakhideno and Dorenuma; and whether the check fraud scheme was within the scope of an agreement between the three. **United States v. Evbuomwan**, 992 F.2d 70 (5th Cir. 1993). The sentence was vacated and remanded

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footnote 1 continued

burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

for the district court to make explicit findings on these issues. *Id.* at 74-75.

On remand, the district court determined that Evbuomwan had agreed to undertake criminal activity jointly with Aakhideno and Dorenuma; and that the check fraud scheme was within the scope of their agreement. The same sentence was imposed; Evbuomwan appealed again.

Evbuomwan's notice of appeal, however, was filed on August 11, 1993, 12 days after judgment was entered (following resentencing). Thus, the notice was untimely under Fed. R. App. P. 4(b) (appeals from criminal cases must be filed within ten days of entry of judgment). Accordingly, the United States moved to dismiss the appeal for lack of jurisdiction. This court denied the motion without prejudice to the government's re-filing it if, on remand, the district court determined that there was no excusable neglect to cause the notice of appeal to be filed late. *See* Fed. R. App. P. 4(b) (district court may, upon a showing of excusable neglect, with or without motion or notice, extend time for filing a notice of appeal). On remand, the district court found that Evbuomwan's counsel had acted in good faith and with "substantial diligence", and had failed to timely file the notice of appeal due to his misinterpretation of Fed. R. App. P. 26(c) (three extra days to respond to papers served by mail).

II.

A.

The government again challenges the timeliness of Evbuomwan's appeal, asserting that the district court abused

its discretion in finding excusable neglect. We review that finding only for abuse of discretion. *E.g., Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206 (5th Cir. 1993). The United States contends that counsel's misconstruction of the rules of procedure cannot constitute excusable neglect. *See, e.g., Allied Steel, Gen. Contractor v. City of Abilene*, 909 F.2d 139, 143 (5th Cir. 1990); *Britt v. Whitmire*, 956 F.2d 509, 511 (5th Cir. 1992). Further, it is undisputed that Rule 26(c)'s three-day extension of time for responses to papers served by mail does not extend the time for filing a notice of appeal. *Welsh v. Elevating Boats, Inc.*, 698 F.2d 230, 231-32 (5th Cir. 1983).

Nevertheless, we have held also that Rule 4(b)'s excusable neglect provision, particularly in criminal cases, is "intended to cover, under proper circumstances, ignorance or neglect of counsel in filing late notices of appeal." *United States v. Lewis*, 522 F.2d 1367, 1369 (5th Cir. 1975); *see also United States v. Edwards*, 702 F.2d 529, 530 (5th Cir. 1983) (neglect of current counsel and hiring new counsel during time for filing notice constituted excusable neglect); *compare United States v. Awalt*, 728 F.2d 704, 705 (5th Cir. 1984) (lack of notice of entry of judgment not excusable neglect).

The district court determined, in its discretion, that the notice of appeal was filed two days late as a result of counsel's good faith misinterpretation of the rules, rather than from his simply miscalculating the date on which the notice was due. Under the standard set out by the Supreme Court's recent opinion in **Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. Partnership**, ____ U.S. ____, 113 S. Ct. 1489 (1993), we hold that the district court did not abuse its discretion by concluding that this was excusable neglect.

In **Pioneer**, the court found "excusable neglect" under Rule 9006 (b) (1) of the Bankruptcy Rules to have a similar interpretation to that given the phrase under the Federal Rules of Civil and Criminal Procedure. *Id.* at 1496-97 & n.9. And, the Court held that reading the Rule "inflexibly to exclude every instance of an *inadvertent or negligent omission* would ignore the most natural meaning of the word 'neglect' and would be at odds with the accepted meaning of that word in analogous contexts" –*e.g.*, to imply carelessness. *Id.* at 1498 & n.12 (emphasis added). In determining whether counsel's neglect in filing a notice of appeal was "excusable", the Court noted that "the determination is at bottom an equitable one, taking account of all relevant circumstances", including the danger of prejudice, length of delay, potential impact on judicial proceedings, reason for delay, and whether the movant acted in good faith. *Id.* at 1498 (citation omitted). There is no indication that the government was at all prejudiced by the delay or that it affected judicial proceedings. On the facts in this case, the district court did not abuse its discretion by accepting a notice of appeal filed in good faith, two days late.

B.

Evbuomwan challenges again the district court's determination of the amount of loss attributable to him; and its findings of fact, in reaching that determination, that he agreed to undertake joint criminal activity and that the check fraud scheme was within the scope of that agreement. In reviewing "sentences, we examine factual findings subject to the 'clearly erroneous' standard . . . and . . . accord great deference to the trial judge's application of the sentencing guidelines." *United States v. Humphrey*, 7 F.3d 1186, 1189

(5th Cir. 1993) (citing cases). The sentence will be upheld unless, *inter alia*, it was imposed "as a result of an incorrect application of the . . . guidelines. . . ." *United States v. Haymer*, 995 F.2d 550, 552 (5th Cir. 1993) (citations and internal quotation marks omitted).

1.

Evbuomwan asserts, for the first time on appeal, that the government should have been required to establish the existence of jointly undertaken criminal activity and the scope of that agreement by clear and convincing evidence. Parties are required to raise errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this court may remedy the error only in the most exceptional cases. *U.S. v. Rodriguez*, 15 F.3d 408, 4145 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. *United States v. Olano*, ___ U.S. ___, ___, 113 S. Ct. 1770, 1777-79 (1993).

An appellant who raises an issue for the first time on appeal has the burden to show, *inter alia*, that there is actually an error.[2] There was none. Our court has held that,

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[2] If the appellant meets this burden, he must also show that the error is plain ("clear" or "obvious"), and that it affects substantial rights. *Id.* at 1777-78; *Rodriguez*, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). This court lacks the authority to relieve an appellant of this burden. *Olano*, 113 S. Ct. at 1781. Moreovcer, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." *Id.* at 1778 (quoting Fed. R. Crim. P. 52(b). As the Court stated in *Olano:*

> [T]he standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in

for sentencing, the government must establish the existence of jointly undertaken criminal activity and the scope of any agreement only by a preponderance of the evidence — not, as Evbuomwan urges, by clear and convincing evidence. *See U.S. v. Smith*, 13 F.3d 860, 867 (5th Cir.), *cert. denied*, ____ U.S. ____, 114 S. Ct. 2151 (1994). Obviously, we need go no further.

2.

Evbuomwan also challenges the district court's findings that he agreed to jointly undertake criminal activity with Aakhideno and Dorenuma, and that the check fraud scheme was within the scope of the agreement. As stated, we review factual findings only for clear error. *E.g., United States v. Lghodaro*, 967 F.2d 1028, 1030 (5h Cir. 1992).

Evbuomwan rented an apartment under the name of Ron Ammed Richardson, and Aakhideno and Dorenuma were frequent visitors. The three had various fraudulent identification documents, including identification for both Aakhideno and Evbuomwan in the name of Kerry L. Coggin, stored in a paper sack in the apartment. (Evbuomwan also used identification in the name of Patrick Murken; Aakhideno sent Evbuomwan an American Express moneygram in that name.)

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footnote 2 continued

United States v. Atkinson, (1936).The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting *Atkinson*, 297 U.S. at 160). Thus, our discretion to correct an error pursuant to Rule 52(b) is narrow. *Rodriguez*, 15 F.3d at 416-17.

The sack also contained fraudulent credit cards and twelve counterfeit Texas Department of Public Safety driving permits manufactured by the same counterfeiter. After Evbuomwan was arrested, he sent Tajani Momoh to retrieve the sack, but it had already been seized; and, when Dorenuma was arrested, he was upset that Evbuomwan had not told him the bag had been seized.

Further, Aakhideno's briefcase, which was in Evbuomwan's apartment, had false identification in the name of Karl D. Heinneman d/b/a Bita Electronics. Aakhideno's identification in the name of Heinneman was in the sack. (An account opened in the name of Bite Elecronics was a fraudulent account used to pay down the balances on the fraudulent credit cards found in the sack.) In sum, the district court's findings that Evbuomwan agreed to undertake joint criminal activity with Aakhideno and Dorenuma, and that the check fraud scheme was within the scope of that agreement, were not clearly erroneous.

III.

For the foregoing reasons, the judgment is

AFFIRMED.